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IN THE

Supreme Court of the United States

October Term, 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,
against
PETROLEUM CONVERSION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF

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The significance of the brief in opposition lies not in what it says, but what it finds itself unable to say. Thus, it in no way disputes our statement of the facts, (Pet. pp. 5-9) or our analysis of the decision below (Pet. pp. 9-14). It does not challenge the reasoning or the authorities upon which are based Points I and II of our brief. As to our Points III to XI inclusive, it conspicuously fails even to attempt an answer. If the tactic be to effect disparagement by silence, it is patently born out of the impotency of countervailing argument, for what briefer would exchange the equivocation of silence for the efficacy of sound analysis?

In one respect opposing counsel acknowledges, by his conduct, the validity of one of our basic positions. Our Point V establishes that Mr. Kahan is without status to oppose our motion to dismiss (Brief, pp. 36-39) and that his self-description as attorney for the trustee in bankruptcy of Petroleum Conversion Corporation is unsanctioned (Brief, p. 9). Accordingly, he now shifts his position and subscribes his brief as "Attorney for Petroleum Conversion Corporation, Bankrupt" (p. 12). But this description recklessly disregards the record. J. Harlan O'Connell, Esq. was and still is the attorney for the respondent (R. 6, 15, 24, 39) and as such, has been served with, and he has admitted service of, the petition and supporting brief herein. Mr. Kahan's motion to be substituted for Mr. O'Connell as attorney for Petroleum Conversion Corporation was denied by the court below (R. 68, 69) and the time within which to seek a review of such denial has expired.*

Additional urgent reasons make this reply brief necessary. (1) The brief in opposition relies chiefly on a point not even considered by the court below and thus was not treated in our main brief; (2) its contentions in a number of instances are predicated upon material mistatements of facts, particularly as to matters dehors the record; and finally (3) the authorities cited by the brief in opposition are not in point. These defects are so interwoven in the fabric of the opposing brief that it is awkward to consider them separately.

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* As the motion for substitution itself tacitly admits, the order of the referee in bankruptcy designating Mr. Kahan as attorney for the bankrupt, is not *per se* sufficient to effect that result. Manifestly, such an order cannot affect the record status of an attorney in another court and in another proceeding. Furthermore, nothing in the Bankruptcy Act authorizes the referee to appoint an attorney for the bankrupt, without the bankrupt's consent.

The main opposing contention involves all of the defects mentioned. Mr. Kahan's brief devotes most of its "Summary Statement of the Matters Involved" (Brief, pp. 2, 3), a large part of its Point I (pp. 9, 10), and its Point III (pp. 11, 12) in a strenuous endeavor to prove that entry and notice of judgment pursuant to Rule 77d of the Federal Rules of Civil Procedure were complied with by the Clerk of the District Court only in regard to the decree of August 3, 1948 and that therefore the decree of April 10, 1947 was unappealable. To begin with, the facts as to compliance with said Rule 77d do not appear in the record; and no effort was made to have them included. Mr. Kahan's determined effort to raise this issue now bears mute but eloquent testimony that he deems the decision below inadequately sustained by its stated grounds, and that it requires a prop, albeit without foundation in the record. But the effort is futile, as a matter of fact and of law. In order to lay at rest any doubt as to the merits of this contention, we are taking the liberty, and indeed, we are required by the necessity of the situation, to step outside of the record and point out that notice and entry complying with said Rule 77d were given not only with respect to the decree of August 3, 1948 but also as to that of April 10, 1947. The district clerk's docket entry therefor states:

> "Apr 10 1947 Filed Final decree determining rights to stock, etc.—(see decree)—Leibell, J. Mailed notice of entry 4-11-47"

Moreover, *Hill* v. *Hawes*, 320 U. S. 520, upon which our opponent's contention in this respect is based (see brief, p. 9), held merely that non-compliance with Rule 77d tolled the running of the period for appeal until notice of entry

of the judgment was sent to appellant's counsel. Here notice of the entry of the April 10, 1947 decree was not required to start the running of the period for appeal by Petroleum Conversion Corporation since said decree was entered on the motion of its attorney as well as the attorney for the Rinke Agency Subscribers (R. 23, 24).

Other misstatements of fact which permeate opponent's brief include the assertions (1) that the Findings of Fact and Conclusions of Law below were "approved by all counsel" (Brief in opp. p. 3). Besides this is a matter outside of the record; (2) that "The trial court explicitly left and reserved" in the April 10, 1947 decree "for subsequent determinaion after hearings before the court, the question of the full amount of the judgment * * *" (Brief in opp., p. 6). On the contrary, said decree explicitly sustained the claim on behalf of the Rinke Agency Subscribers in the total sum of $176,245.24 with interest as therein set forth from various dates in 1926 (R. 27) for which, in fact, the judgment of August 3, 1948 in the sum of $408,949.57 was entered (R. 30); (3) similarly, that the April 10, 1947 decree made no "determination of the existence and ownership of the claims of the various Subscribers of the Rinke Agency" (Brief in opp. p. 9). The decree actually determines that such claims did exist and were owned by the Subscribers of the Rinke Agency or their successors in interest. It merely left for subsequent proceedings the matter of their identification and the assertion of their respective rights to share in the recovery. (4) The quotation from the memorandum decision rendered by the trial court on March 16, 1948 is no part of this record and obviously was improperly included by Mr. Kahan in his "Summary Statement of the Matters Involved" (brief p. 3). Moreover, the quotation was mere

dictum; the decision denied Mr. Kahan's application, (at that time, in behalf of preferred stockholders) to intervene so as to be enabled to appeal in behalf of Petroleum Conversion Corporation the decision held on the ground that if the decree was not final the time to appeal by the corporation had not expired; if final, it had long since expired. Further, the trial court cast grave doubt upon the *bona fides* of the application.

Let us now consider the authorities cited by our opponent. *Zimmerman* v. *U. S.*, 298 U. S. 167, is a mainstay of the opposition. But that case is clearly inapplicable. There it was held that the decree after trial was deprived of finality by the order of the trial court extending the term in order to make changes therein under his power to modify or revoke his judgment for error of fact or law. In the instant case, the April 10, 1947 decree was in no way subsequently modified; rather the decree of August 3, 1948 and the proceedings upon which it was based, were not only in harmony with the April 10, 1947 decree but actually carried out its terms. Even more to the point is the fact that the dismissal of respondent's claims by the April 10, 1947 decree was in no respect affected by the later proceedings or the decree of August 3, 1948.

Similarly, *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203 deals only with the effect of a motion pursuant to Rule 52b of the Federal Rules of Civil Procedure, to amend and supplement the findings, upon the finality of a proceeding judgment. This case, if it has any force here, tends to favor petitioner since the opinion specifically stresses that said motion contemplated alteration of rights already adjudicated (318 U. S. at 205). It was for this reason that the court held that the finality

of such judgment was suspended pending disposition of the motion.

Suggs v. *Mutual Benefit Health & Acc. Ass'n*, 10 Cir., 115 Fed. (2d) 80, is precisely like the *Leishman* case.

Kuhn v. *Canteen Food Service*, 7 Cir., 150 Fed. (2d) 55 is based on *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, and holds only that, where the *defendants* are jointly charged, dismissal as to some of them is not a final decree. It is quite the contrary of the dismissal on the merits of one of two adverse interveners' claims, as here. See *Clark* v. *Taylor*, diss. op., 163 F. 2d 940, 944, 948.

Korematsu v. *U. S.*, 319 U. S. 432 is totally unrelated to the matter at hand. It held that an order of the District Court placing a convicted defendant on probation without imposing sentence was a final decision despite the general rule that "final judgment in a criminal case means sentence".

In *Allen B. Wrisley Dist. Co.* v. *Serewicz*, 7 Cir., 158 F. (2d) 721, the order settled but one of numerous issues; there is no analogy to the decree here of April 10, 1947 which determined all the issues before the court, including the dismissal of all of respondent's claims.

Craighead v. *Wilson*, 18 How. 199 is likewise beside the point. There heirs in an accounting action sought to recover part of decedent's property; the decree merely determined their heirship and their relative rights in the succession. In other words, it established their right to an accounting—a typical interlocutory decree. It did not establish their right to any recovery. That, as the very quotation cited by Mr. Kahan indicates (Brief, p. 5), depended *inter alia* upon the balancing of the equities, determination of what had been expended on the property,

and what had been received by the claimants, all of which required adjudication by the Master appointed by the decree for that purpose.

Catlin v. *U. S.*, 324 U. S. 329 is considered in our main brief (p. 29). Its principal point is that in that case there was no adjudication on the merits by the decree in question. Here the dismissal of Petroleum Conversion Corporation's claim on the merits and, in fact, the disposition of every other issue before the court by the decree of April 10, 1947 stands in sharp contrast.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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